**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Petition for Declaratory Ruling | ) | WT Docket No. 05-194 |
| Filed by CTIA Regarding Whether | ) | |
| Early Termination Fees Are "Rates | ) | |
| Charged" Within 47 U.S.C. § 332(c)(3)(A) | ) | |
| | ) | |
| To: The Commission | ) | |

# REPLY COMMENTS OF T-MOBILE USA, INC. IN SUPPORT OF CTIA PETITION FOR DECLARATORY RULING


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**REPLY COMMENTS OF T-MOBILE USA, INC.**
**IN SUPPORT OF CTIA PETITION FOR DECLARATORY RULING**

T-Mobile USA, Inc. ("T-Mobile") hereby submits its reply comments in support of the Petition for an Expedited Declaratory Ruling filed by CTIA - the Wireless Association™ in the above-captioned proceeding.[1/] Many commenters agree with CTIA's position that early termination fees ("ETFs") in wireless carriers' service contracts are "rates charged" for commercial mobile radio services ("CMRS") and, as such, state regulation of ETFs is barred under section 332(c)(3)(A) of the Communications Act and Commission precedent. Because courts, public utility commissions, and legislatures increasingly are asserting jurisdiction over this crucial element of wireless carriers' rate structures, with widely disparate results across the country, it is essential that the Commission provide the guidance sought by CTIA as promptly as possible.

[1/] Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling, WT Docket No. 05-194 (filed Mar. 15, 2005); *see* Public Notice, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A), WT Docket No. 05-194 (May 18, 2002).

## INTRODUCTION AND SUMMARY

In 1993, Congress concluded that the most effective way to spur wireless growth and competition would be to free CMRS providers from burdensome state rate and entry regulation. Congress's confidence in the power of the marketplace was well placed -- since adding section 332(c)(3)(A) to the Communications Act, wireless subscribership has grown to more than 190 million, coverage has expanded to virtually every area of the country, and consumers are enjoying lower rates, an abundance of new features and equipment, and a wide array of pricing plans.

In recent years, however, the plaintiffs' class action bar has managed to convince various courts -- in addition to well-intentioned consumer groups -- that Congress did not mean what it said. Specifically, in the context of state-law causes of action, some courts have carved out ETFs from the areas of adjudication prohibited under section 332, finding that they have jurisdiction to rule on the reasonableness of the charge. At the same time, other courts have correctly held that ETFs are essential elements of a wireless carrier's rate structure. Because these disparate judicial decisions have the potential to impede wireless carriers' ability to design and deploy service plans, the Commission should confirm as expeditiously as possible that ETFs are "rates" within the meaning of section 332(c)(3)(A).

Notwithstanding the arguments presented by some commenters, it is unnecessary for the Commission to conduct a detailed factual investigation into the specific costs that carriers intend to recover through each ETF, or to make a broad declaration that every lawsuit that touches on ETFs is preempted. To the contrary, CTIA's petition merely asks for a ruling on the legal issue of whether ETFs are "rates charged," the state regulation of which is barred under section 332. Taking that guidance, it would then be up to the courts themselves to determine whether a specific claim or remedy is permitted by the statute.

To grant CTIA's Petition, the Commission need only rely on its previous interpretations of ETFs in other contexts, as well as its decisions construing the scope of section 332's rate regulation prohibition. Commenters' efforts to brush aside these Commission rulings on the ground that ETFs appear in the "wrong" section of carriers' service agreements and are not charged on a monthly basis are unpersuasive. An ETF, regardless of its contract placement or time of assessment, allows wireless carriers to recoup their costs and earn a return on the services they provide -- both of which are primary functions of a rate. Similarly, contentions that ETFs are not rates because they are not "prorated" is an attack on the reasonableness of the assessment as opposed to a legitimate inquiry into the definition of the charge.

State regulation of ETFs is wholly unnecessary to protect consumers. Although some organizations allege that complaints filed with the Commission evidence rising dissatisfaction with wireless billing and marketing practices, in reality, the number of complaints on ETFs and all other wireless issues is infinitesimal when compared to the number of wireless subscribers, amounting to *less than four-thousandths of one percent* of the customer base. By contrast, wireless consumers have demonstrated by their behavior that they are more than willing to accept generous upfront handset and rate discounts in exchange for term contracts and associated ETFs. The Commission should not allow states -- in the false pursuit of "consumer protection" -- to frustrate carrier efforts to satisfy their subscribers' demands.

## I. EARLY TERMINATION FEES ARE "RATES CHARGED" UNDER SECTION 332

### A. The Wireless Industry Request Is Very Narrow

Contrary to some commenters' overblown assertions, the relief sought by the wireless industry is very narrow. The carriers merely ask for confirmation that ETFs are "rates charged" within the meaning of section 332(c)(3)(A). This does not require the Commission to make a sweeping ruling that every possible state-law claim that mentions ETFs is preempted, as Wireless Consumers Alliance *et al*. ("WCA") contends,[2/] or develop a detailed factual record on the specific costs that carriers recover or intend to recover through every ETF ever considered, as AARP asserts.[3/] Rather, to grant CTIA's Petition, the Commission need only look to its own previous decisions interpreting ETFs in other contexts and its rulings construing the term "rates charged" in section 332(c)(3)(A).

As WCA acknowledges, the resolution of CTIA's request turns on the law, and therefore, the Commission's task in this proceeding is to interpret an act of Congress, not to become involved in an elaborate ratemaking case.[4/] Indeed, in resolving a previous declaratory ruling petition regarding the scope of section 332, the Commission explicitly rejected arguments that it could "only make a decision based on the facts of the particular case," and instead found that it had full authority to address the legal question of whether section 332 generally preempts certain state-law claims.[5/] While the Commission

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2/ Comments of WCA at 24.

3/ Comments of AARP at 19.

4/ Comments of WCA at 37.

5/ *See Wireless Consumers Alliance, Inc., Petition For Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of* provided courts and litigants valuable "legal guidance" on the scope of the Communications Act, it properly held that "the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by a state trial court based on the specific claims before it."[6/] In light of the widely varying outcomes in state courts regarding the *legal* question of section 332's preemptive effect, such guidance is sorely needed here.

To be sure, a court may appropriately find that a suit involving ETFs brought under state law falls within its jurisdiction. Indeed, in the *WCA Order*, the Commission explained that adjudication of a claim that has only an "incidental" effect on the prices charged by a wireless carrier would not constitute prohibited rate regulation under section 332.[7/] The wireless industry is not requesting that the Commission overturn this precedent. On the contrary, the lawsuits challenging ETFs are not at all like those at issue in the *WCA Order* -- rather, the plaintiffs in the ETF context are directly challenging wireless carriers' decisions to assess ETFs and the amounts charged as "unconscionable," "unreasonably favorable," "unduly harsh," and the like. In other words, the claims ask the courts to make an outright determination of whether the ETF is reasonable.

Notwithstanding that there may be "legitimate" lawsuits involving ETFs, however, those cases are likely to be rare. As Cingular points out, "the plaintiffs class

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*the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws,* Memorandum Opinion and Order, 15 FCC Rcd 17021, 17026 ¶ 10 (2000) ("*WCA Order*").

6/ *WCA Order* at 17036 ¶ 28.

7/ *Id*. at 17039 ¶ 33.

action bar has packaged and repackaged their challenges to the reasonableness and lawfulness of ETFs in a variety of state-law wrappers" in an attempt to squeeze them into the "other terms and conditions" language of section 332.[8/] In many cases, the "contents of those packages remain challenges to the inherent fairness and reasonableness of 'rates charged' for CMRS."[9/] Recognizing the strong incentive of plaintiffs' attorneys to bypass the limits Congress has placed on their ability to adjudicate wireless rates under state law, the Commission has emphasized that "it is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section 332."[10/] T-Mobile urges the Commission to reiterate that admonishment here, and remind courts to look beyond the language of the claims asserted to assess their jurisdiction based on whether the court is being asked to invalidate ETFs or otherwise prohibit or restrict their use.

### B. ETFs Are Charges for Wireless Service

All wireless carriers filing comments in this proceeding affirm that the purpose of their ETF assessments is to recover the costs of providing wireless service. In particular, they explain that they have chosen to offer wireless services through two general rate mechanisms -- the first is a term plan, under which customers receive discounted or free handsets and "buckets" of minutes for a monthly charge, and the second is a prepaid plan, which normally does not provide for handset discounts and requires customers to pay on a per-minute basis. As Cingular notes, absent an ETF, there is no practical difference

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8/ Comments of Cingular at 15.

9/ *Id.*

10/ *WCA Order* at 17036 ¶ 28.

between the term contract and a month-to-month, pay-as-you-go service arrangement.[11/] Under term plans, the customer agrees *either* to pay monthly charges for the duration of the term *or* pay the ETF.[12/] Although the times and circumstances under which monthly charges and an ETF may be assessed vary, both charges are designed to recover the costs a carrier incurs in acquiring and providing wireless service to a customer.

The consumer groups and plaintiffs' attorneys filing in this proceeding are simply incorrect when they assert that no "services" are associated with an ETF. As the Commission has made clear, ETFs are "a valid quid pro quo for the rate reductions included in long-term plans. . . . [B]ecause carriers make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs."[13/] The "costs" to which the Commission was referring in *Ryder* are the costs of providing telecommunications service.[14/] A wireless carrier puts an ETF in its contract for precisely the same purpose -- to ensure that it is able to recover its investments in acquiring subscribers and providing them with wireless service.

There also is no merit to certain commenters' arguments that an ETF must be a "term or condition" under the statute because the ETF provision is set forth in the "terms" section of wireless contracts. The Commission recently determined that "line item"

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11/ Comments of Cingular at 7.

12/ *Id*.

13/ *Ryder Communications, Inc. v. AT&T Corp., Memorandum Opinion and Order,* 18 FCC Rcd 13603, 13617 ¶ 33 (2003) ("*Ryder*").

14/ *Id*. ("[T]he Commission has allowed carriers to use early termination provisions to allocate the risk of *investments associated with long term service arrangements* with their customers.") (emphasis added).

charges are "rates" within the meaning of section 332,[15/] notwithstanding that wireless service agreements generally include provisions regarding such charges in the same "terms" section as the ETF. It would indeed be an elevation of form over substance if the Commission were to base its legal interpretation of the statute on the part of a consumer contract in which a wireless carrier chooses to place a particular charge.

It is likewise beside the point that ETFs are charged when the customer has chosen to discontinue service as opposed to some other point in the parties' relationship. As SunCom explains, "contractual early termination fees affect all customers that have entered into a contract that contains them, even those customers that never have to pay them."[16/] Specifically, the rate plans that wireless carriers offer to term customers, including applicable handset and other discounts, are only possible because the carriers build ETFs -- and the cost recovery they ensure -- into their rate structures. Subscribers who do not terminate service during the terms of their contracts are entitled to wireless service at monthly rates that allow carriers to recover their costs and a reasonable profit over the life of the contract. By contrast, subscribers that choose to terminate early pay the ETF, which -- like monthly rates -- provides carriers with a means to recover the costs of providing service, but over a period shorter than the contemplated contract term.[17/]

In this regard, there is no support for the notion that the definition of "rates charged" hinges on whether or not the charge appears in monthly bills. Certain wireless customers -- for example, those taking prepaid service -- do not receive any bills,

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[15/] *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition For Declaratory Ruling Regarding Truth-In-Billing*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6462 ¶ 30 (2005).

[16/] Comments of SunCom at 26.

[17/] *Id*.

monthly or otherwise, from their carriers, but there is no question that the amounts they pay for handsets or to add minutes to their "accounts" (usually via credit card over the telephone or on the Internet) are charges for wireless service. Similarly, wireless activation or set-up charges plainly are rates under section 332 even though they are assessed at the outset of the contract and never again.

Nor is there any significance to the fact that an ETF may not decline over the term of the contract. Wireless carriers design their rate structures calculated on the amounts they need to collect to recover their costs and earn a profit across their entire customer base. In setting the ETF, carriers bear in mind that, although some terminating customers may exit at the beginning of the contractual period and others near the end, it is impracticable to conduct an individualized assessment of whether all upfront costs (including a reasonable profit) may have been recovered for a particular customer.

In any event, commenters' efforts to draw a distinction between ETFs based on whether or not they are prorated conflates the issue of whether a particular ETF is a "rate charged" with the issue of whether it is "reasonable." An ETF is a rate regardless of whether it is $50 or $500, and regardless of whether it decreases, increases, or stays the same over the life of the contract. While the Commission has the authority to invalidate or require that changes be made to ETFs, courts cannot do so under the rubric of state law. When courts engage in this type of "reasonableness" analysis, they necessarily are regulating the rates charged by wireless carriers.

Similarly, the arguments made by some commenters that ETFs are actually liquidated damages and, therefore, cannot be "rates" are just word games with no substance or underlying logic. NASUCA recounts a laundry list of state consumer protection laws governing liquidated damages clauses under state contract law,[18/] but it fails completely to address the fundamental issue before the Commission -- namely, the crucial role that ETFs play in carriers' rate structures. Regardless of the subheading under which an ETF may appear in any particular carrier's service agreement or the words used by the carrier to describe the ETF, the ETF is designed, like other rate elements, to recoup the carrier's costs and earn a return on the wireless services it provides. Thus, the label that may be placed on ETFs under state contract law is irrelevant for the purpose of determining whether ETFs are "rates" under section 332.[19/]

The fallacy of the consumer group arguments is illustrated by the practices adopted by one of the organizations commenting in this proceeding in marketing its own services. Specifically, Consumers Union ("CU") offers an online product ratings service, called Consumer Reports.org, under three alternative pricing plans -- $26/year; $19/year (special to subscribers to Consumer Reports magazine); and $4.95/month.[20/] All three plans require customers to pay in full at the beginning of the term (either for a year or a month depending on the plan chosen) and CU provides no refunds if the customer wishes to cancel during the contract period, regardless of whether the cancellation occurs near the beginning of the term or in the last few days. There also is no indication on the

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18/ Comments of NASUCA at 13-17.

19/ *See, e.g.*, *Simons v. GTE Mobilenet*, No. H-95-5169, at 1, 4 (S.D. Tex. April 11, 1996) (plaintiff "challeng[es] the liquidated damages provision imposing an early termination charge," but "Congress has expressly and completely preempted the entire field of rate regulation under section 332(c)(3)(A), making Texas common law irrelevant."); *Consumer Justice Foundation v. Pacific Bell Tel. Co.*, No. BC214554 (Cal. Super. Ct. July 29, 2002), *appeal dismissed*, No. B172552 (Cal. App. 2d Dist. March 2, 2004) (holding that claims alleging that ETF was invalid liquidated damages clause under Civil Code § 1671(d) were preempted).

20/ *See* Consumer Reports.org website (available at: http://www.consumerreports.org/main/commerce/agreement.jsp?bmUID=1124913213251).

Consumer Reports website that refunds will be forthcoming if a customer complains that he has found a better deal, say, from Consumers' Checkbook.

Notwithstanding that CU does not "prorate" its charges based on the amount of time a customer actually uses the service, and notwithstanding that the level of CU's discounts are tied to the length of the term selected and the other services purchased,[21/] the $26, $19, or $4.95 fees assessed by CU are indisputably "rates charged" for the organization's services. As the group states, "CU supports itself through the sale of [its] information products and services, individual contributions, and a few noncommercial grants."[22/] Like CU, wireless carriers support themselves through the sale of their products and services. In response to customer demand, however, wireless carriers have chosen to structure their rates to allow payment over the life of the contract, with an upfront handset subsidy, and an ETF if the customer decides to terminate the contract before it expires.

## II. THE CONSUMER GROUPS AND PLAINTIFFS' BAR MISCHARARACTERIZE COMMISSION AND JUDICIAL PRECEDENT

Certain parties claim incorrectly that the Commission already has decided that ETFs are "terms and conditions" as opposed to "rates" under section 332.[23/] In the *CA Petition Order*, for example, upon which AARP relies for this proposition, the

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21/ For example, if a CU customer chooses the monthly plan, he could end up paying $59.40/year -- more than twice the amount of the annual plan. That customer, however, retains the freedom (subject to payment for partial months) to switch to Consumers' Checkbook whenever he wants.

22/ *See* Consumer Reports.org website (available at: http://www.consumerreports.org/main/content/aboutus.jsp?FOLDER%3C%3Efolder_id=456981&ASSORTMENT%3C%3East_id=93463&CONTENT%3C%3Ecnt_id=687&bmUID=1124916778917).

23/ *See* Comments of AARP at 15; Opposition to Petition for Declaratory Ruling and Cross-Petition for Declaratory Rulings of Debra Edwards *et al.*, WT Docket No. 05-193, at 33-34.

Commission made clear that it was not prepared on the then-existing record to determine whether section 332 precludes state oversight of ETFs as rate regulation, or whether such oversight may be retained by the states as terms and conditions regulation.[24/] Further, as the carriers participating in this proceeding point out, in another section of the *CA Petition Order*, the Commission stated that termination charges are a "component of cellular prices":

> The initial issue we confront is how to analyze the wealth of price data in the record. Although the two major standard components of cellular prices are monthly, flat-rate access charges and per-minute airtime charges, customer bills are driven in part by other variables, including "free" airtime offered with certain pricing plans, termination charges (if any) and contract length (monthly or for a period of months or years). Such variables complicate the task of analyzing pricing data. . . ."[25/]

Similarly, contrary to another of AARP's suggestions,[26/] the Commission's determination in the *Intermodal Porting Order* that wireless carriers may not impose restrictions before porting out customer numbers said nothing whatsoever about whether or not ETFs are rates. To the contrary, the Commission merely acknowledged that it was not "prevent[ing] carriers from recovering their investment in their customers," and that requiring porting upon request would not have such an effect because "carriers remain free to seek compensation for any breach of contractual agreements."[27/]

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[24/] *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 FCC Rcd 7486, 7535 ¶ 109 (1995).

[25/] *Id*. at 7536 ¶112.

[26/] Comments of AARP at 15.

[27/] *Telephone Number Portability -- Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20975-76 ¶ 14 (2003) ("*Intermodal Porting Order*").

The consumer and plaintiff groups also selectively present the court cases they have won, and argue that only those courts have engaged in a reasoned assessment of the law. A number of other courts have found, however, with a far more sophisticated analysis, that ETFs are rates under section 332. For example, the U.S. District Court for the Southern District of Illinois examined the purpose of ETFs and found that, because the fees allow carriers to offer term contracts at lower monthly rates than those for month-to-month prepaid service, a state-law "challenge to the fee is completely preempted."[28/] That same court more recently concluded "that the [ETF] is directly connected to the rates charged for mobile services, and any challenge to such a fee is preempted by federal law."[29/] The U.S. District Court for the Eastern District of Michigan has similarly found that, by virtue of the Supremacy Clause of the U.S. Constitution, section 332 preempts claims over charges for termination of wireless service.[30/] It is precisely because of this split among decisions such as these and the ones cited by the consumer and plaintiff groups that CTIA has come to the Commission for guidance.

In addition, some commenters present arguments that imbue certain sections of the Communications Act with far more weight than Congress intended. NASUCA, for instance, contends that section 414 acts as a limit on the Commission's authority to

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[28/] *Redfern v. AT&T Wireless*, No. 03-206-GPM, 2003 U.S. Dist. LEXIS 25745, 1-2 (S.D. Ill. 2003).

[29/] *Chandler v. AT&T Wireless Services*, No. 04-180-GPM, 2004 U.S. Dist. LEXIS 14884, 1-2 (S.D. Ill. 2004) (citing 47 U.S.C. § 332 and *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986-987 (7th Cir. 2000)).

[30/] *Aubrey v. Ameritech Mobile Communications, Inc.*, No. 00-CV-75080, 2002 U.S. District LEXIS 15918, 12-13 (E.D. Mich. 2002).

preempt state regulation of ETFs,[31/] and WCA asserts that, by including section 414, Congress intended wireless providers to be subjected to a patchwork quilt of state regulation (including regulation of ETFs) "just like General Motors, Wal-Mart, and all other companies that do business nationally."[32/] These arguments, however, misconstrue the statute. In the *WCA Order*, the Commission rejected this very position -- taken by some of the same proponents -- and concluded that "[u]nder accepted principles of statutory construction . . . the [section 414] savings clause cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act."[33/] ETFs are a component of wireless rates, and section 332 preempts state regulation of wireless rates. Nothing in section 414 overrides that express preemption.

## III. THE CONSUMER GROUPS AND PLAINTIFFS' BAR IGNORE CONSUMER BEHAVIOR SHOWING AN OVERWHELMING PREFRENCE FOR WIRELESS TERM CONTRACTS

Some commenters assert that states must be permitted to regulate ETFs in order to protect consumers. It is not clear, however, how invalidation or restriction of ETFs would further the interests of consumers, especially if the ultimate requirements differ widely from state to state and change with each new court ruling. Obviously, certain plaintiffs' attorneys would benefit monetarily through court decisions granting refunds of ETFs, but the vast majority of consumers, who currently enjoy hefty discounts and stable

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[31/] Comments of NASUCA at 10.

[32/] Comments of WCA at 39. Needless to say, General Motors and Wal-Mart are not wireless carriers whose rates Congress has explicitly preempted from such a "patchwork quilt" of regulation.

[33/] *WCA Order* at 17040 ¶ 37.

monthly payments by virtue of term plans and ETFs, stand to gain nothing through such awards.

The claims of groups such as NASUCA that "[e]vidence -- in the form of complaints to the Commission, to states, and to consumer organizations -- shows that wireless customers are growing increasingly dissatisfied with carriers' billing and marketing practices, particularly the widespread use of ETFs"[34/] have no basis in reality. By the Commission's own measure, wireless consumers have demonstrated very little unhappiness with the way carriers structure their rates. Indeed, total wireless complaints in the first quarter of 2005 fell 17 percent from the same period the year before, to an average complaint rate of just 0.0039 percent of all wireless consumers. Moreover, only 15 percent of that miniscule number of wireless complaints were related to early termination issues.[35/] The Commission should not permit a small cadre of well-intentioned but misguided consumer groups or selfishly motivated plaintiffs' representatives to fundamentally upset the structure of wireless rate plans currently available to -- and overwhelmingly favored by -- wireless consumers.

The fact that most consumers choose term plans with their associated ETFs over prepaid month-to-month plans is the purest form of market-based evidence that the Commission could ask for. NASUCA attempts to discount this evidence by playing fast

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34/ Comments of NASUCA at 32.

35/ *See* FCC News Release, *Quarterly Report on Informal Consumer Inquiries and Complaints Released* (rel. August 12, 2005), (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260528A1.doc). Nor do the form letters submitted in this docket as a result of an organized letter writing campaign prove NASUCA's point. The consumers who wrote in were offered a misguided choice by the groups that initiated the campaign -- they were told that they could continue to enjoy low rates and handset discounts without making any commitments in return. If presented with the real world scenario, however -- that elimination of ETFs would result in higher airtime rates and fewer service plan alternatives -- it is highly unlikely that many of them would have hit the send button.

and loose with the facts, claiming that "[m]ost of the largest CMRS carriers will provide service only if the customer signs a one- or two-year contract."[36/] But NASUCA's argument is belied by the record compiled in this proceeding showing that *all* nationwide carriers offer both term contracts and prepaid or month-to-month calling plans. Given that nearly every wireless consumer has a choice of multiple prepaid, month-to-month, and term contract plans,[37/] and that the vast majority of consumers opt for lower-priced term plans with ETFs, there seems little room for NASUCA or others to claim that consumers are harmed by ETFs.

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[36/] Comments of NASUCA at 28.

[37/] *See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Ninth Report, 19 FCC Rcd 20597, 20644-645 ¶¶ 113-116 (2004) (discussing "rollout of differentiated pricing plans" and availability of prepaid plans from all major carriers).

## CONCLUSION

For the foregoing reasons, the Commission should grant CTIA's Petition and confirm that ETFs are "rates charged" within the meaning of section 332(c)(3)(A) of the Communications Act.

Respectfully submitted,

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August 25, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of August, 2005, I caused a true and correct copy of the foregoing Reply Comments to be served upon the following persons via ECFS and/or via E-mail, as indicated.

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